Supreme Court, U.S.
FILED
NOV 12 1992
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No. 92-641

In The

Supreme Court of the United States

October Term, 1992

LEONARD NOBELMAN AND HARRIET NOBELMAN,

Petitioners,

vs.

AMERICAN SAVINGS BANK,

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Does 11 U.S.C. § 1322(b)(2) (1988) prohibit a debtor from bifurcating a secured claim, secured only by a security interest in real property that is the debtor's principal residence, into a secured portion equal to the value of the real property and an unsecured portion for the remainder of the indebtedness?

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent, AMERICAN SAVINGS BANK, F.S.B., by and through its undersigned counsel, respectfully requests that this Court deny the Petition for Writ of Certiorari submitted by Petitioners, LEONARD NOBELMAN AND HARRIET NOBELMAN.

STATEMENT

There are errors and omissions in Petitioners' list of all parties to the proceedings. Petitioners' listing on page ii of Tim N. Truman as the Standing Chapter 13 Trustee for the Northern District of Texas is incorrect in that

Molly W. Bartholow has succeeded Mr. Truman as trustee in this case. Likewise, Petitioners' listing on page ii of Murray Mortgage Company is also incorrect because STM Mortgage Company has succeeded Murray Mortgage Company as servicing agent for Respondent.

There is an error in Petitioners' statement on jurisdiction on page 1 which incorrectly invokes jursdiction under 28 U.S.C. § 1254(2) (1988). Petitioners seek review by Writ of Certiorari under 28 U.S.C. § 1254(1) (1988).

Petitioners incorrectly cite on page 1 Article II, Section 8 of the Constitution of the United States as a constitutional provision involved in this case. Article I, Section 8 of the Constitution of the United States addresses the subject of bankruptcies. U.S. CONST. art. I, § 8, cl. 4.

Petitioners' argument contains a misstatement of fact. Petitioners' assertion on page 3 that the Fifth Circuit's opinion in this case did not mention the Third Circuit's decision in *Sapos v. Provident Institution of Savings in Town of Boston*, 967 F.2d 918 (3rd Cir. 1992), is incorrect because the Fifth Circuit's opinion discusses *Sapos. Matter of Nobleman*, 968 F.2d 483, 486 n.6 (5th Cir. 1992).

REASONS FOR DENYING THE WRIT OF CERTIORARI

1. THE FIFTH CIRCUIT'S DECISION IS CONSISTENT WITH THIS COURT'S DECISION IN *Dewsnup v. Timm*, 502 U.S. ___, 112 S.Ct. 773, 116 L.Ed.2d 903 (1992). THE FIFTH CIRCUIT'S DECISION IN *Grubbs v. Houston First American Savings Association*, 730 F.2d 236 (5th Cir. 1984) (en banc), AND BANKRUPTCY COURT DECISIONS.

The narrow issue of whether a debtor may, under 11 U.S.C. § 506(a) (1988), "strip down" a creditor's lien on real property to the value of the collateral when that value is less than the amount of the claim secured by the lien has been addressed by this Court in *Dewsnup v. Timm*, 502 U.S. ___, 112 S.Ct. 773, 116 L.Ed.2d 903 (1992). In *Dewsnup*, this Court held that "§ 506(d) does not allow [a debtor] to 'strip down' [a creditor's] lien, [where a creditor's] claim is secured by a lien and has been fully allowed pursuant to § 502." *Dewsnup*, 502 U.S. at ___, 112 S.Ct. at 778, 116 L.Ed.2d at 911.

Indeed, this Court concluded in *Dewsnup* that "to grant a debtor the broad new remedy against allowed secured claims to the extent that they become 'unsecured' for purposes of § 506(a) without the new remedy's being mentioned somewhere in the Code itself or in the annals of Congress is not plausible, in our view, and is contrary to basic bankruptcy principles." *Dewsnup*, 502 U.S. at ___, 112 S.Ct. at 779, 116 L.Ed.2d at 913. This Court reasoned that: "[T]he creditor's lien stays with the real property until the foreclosure. That is what was bargained for by the mortgagor and mortgagee." *Dewsnup*, 502 U.S. at ___, 112 S.Ct. at 778, 116 L.Ed.2d at 911.

Consistent with this Court's holding in *Dewsnup*, the Fifth Circuit properly refused to permit Petitioners to "strip down" Respondent's secured claim. The Fifth Circuit's holding is also consistent with its prior decision in *Grubbs v. Houston First American Savings Association*, 730 F.2d 236 (5th Cir. 1984) (en banc). Although the Fifth Circuit did not specifically address the interplay between 11 U.S.C. § 506(a) (1988) and 11 U.S.C. § 1322(b)(2) (1988), the Court of Appeals did observe that the legislative intent of § 1322(b)(2) was not to permit any modifications of a claim secured by the debtor's principal residence. *Grubbs*, 730 F.2d at 246.

Finally, the Fifth Circuit's opinion is consistent with Bankruptcy Court decisions which have held that a debtor may not, under 11 U.S.C. § 506(a) (1988), "strip down" a creditor's lien on real property to the value of the collateral when that value is less than the amount of the claim secured by the lien. *Nobleman*, 968 F.2d at 486-87 (and cases cited therein).

CONCLUSION

For the above and foregoing reasons, Petitioners' Writ of Certiorari should be denied.

Respectfully submitted,

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